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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 416.

UNITED STATES OF AMERICA, *ex rel.* NIELS PETER CLAUSSEN,

Petitioner,

—against—

HONORABLE BENJAMIN M. DAY, COMMISSIONER OF IMMIGRATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL AND REPLY BRIEF FOR PETITIONER.

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Statement.

The facts are fully stated in petitioner's brief filed in support of the petition for the writ of certiorari. This brief is filed merely to reply to some of respondent's argument, and to call attention to several recent decisions.

Argument.

When thoroughly digested, the argument advanced by respondent throughout his brief may be reduced finally to the single proposition that the words "entry of the alien to the United States" as used in §19 of the Act of February 5, 1917 (U. S. Code, Tit. 8, §155), here involved, have a peculiar meaning distinct from their meaning, or the meaning of similar words, in other statutes relating to immigration and the merchant marine. The fallacy of the proposition is particularly clear from pages 8, 16, 17, 18 and 23 of respondent's brief.

Respondent concedes the correctness of the decisions in the *Chinese Cabin Waiter*, 13 Fed. 286, and *Chinese Laborers on Shipboard*, 13 Fed. 291 (see Respondent's Brief, pp. 16-17), claiming merely that what was said about an American ship constituting American territory was unnecessary to the decision. If so much were conceded by petitioner, those decisions, if followed, yet require reversal of the judgment in this case. For if in those cases the Chinese aliens involved were not brought within the United States from any foreign port or place, despite the fact that the vessel on which they had shipped had gone into foreign waters and foreign ports, then Claussen on his arrival in Boston in 1918 on the ship on which he had shipped out of New York for a round-trip voyage, was not brought within the United States from any foreign port or place, and did not make an "entry * * * to the United States" from a foreign port or place. If the Chinese were not within what the Court held, and what respondent concedes, to have been the object of the Act of Congress there involved, "to pre-

vent the further immigration of Chinese laborers to the United States" (Respondent's Brief, p. 16), then the Chinese were not, by their arrival here at the end of the voyage, making an "entry • • • to the United States;" and neither was Claussen. If under the circumstances of the Chinese cases, the Chinese laborers involved were "already here" (Respondent's Brief, p. 16, and 13 Fed. 289), as of a time prior to the return end of the voyage, so that the landing was not an arrival or entry, or bringing within the United States under the Act there involved, then Claussen's landing in 1918 did not constitute an "entry", legal or illegal. The only "entry • • • to the United States" attributable to Claussen, whether legal or illegal, was his last landing in the United States from a foreign vessel or from a vessel upon which he had shipped from a foreign port or place. The statute does not say "legal entry" nor "illegal entry"; but it does say "entry • • • to the United States".

Suppose that Claussen had been arrested when he was landing from the "Elisha Atkins" in 1918. Would his have been a case for *exclusion* or for *deportation?* To hold that it would have been a case for exclusion would be directly contrary to the Chinese cases, and would result in conflict between statutes as pointed out in those and the other cases discussed in the briefs. But if not a case for exclusion, and if a case for deportation (as to theory, no concession being intended that he was deportable), then his landing was not the making of an "entry • • • to the United States".

Respondent's reference to coast-wise voyages of alien members of the crew as constituting "the movement of aliens from one place in the United States to another"

(Respondent's Brief, p. 23), does not answer the dilemma put by Judge Hand in the case at bar, but serves to emphasize that dilemma as well as to support petitioner's whole argument. Few coast-wise voyages are made in which the vessel does not go beyond the three-mile limit. If in a voyage from New York to Galveston, in the course of which the ship is 25 or 100 miles or more at sea, the crew arrives in Galveston merely from New York, instead of from foreign waters within the meaning of the immigration laws, then the same must hold true in the case of a continuous voyage from New York to Boston via Cuba and Para.

Several decisions of the United States District Courts made since petitioner's brief was filed should be noted.

In *U. S. ex rel. Pantoja* v. *McCandless* (D. C. E. D. Pa.), 29 Fed. (2nd) 586, decided December 11, 1928, Judge Dickinson said:

> "He [relator] came here October 3, 1919, for the first time, and his latest voyage landed him here on December 7, 1925. If, therefore, the pertinent date be that of his first landing, it makes no difference whether the disputed limit be five years or three, and if the pertinent date be that of his latest voyage, again it matters not whether the time be three years or five. The sole question, in consequence, is from which date we should reckon.
>
> It is urged on behalf of the relator that, since October 3, 1919, he has never been out of the United States. This, however, is true only in the sense that the deck and forecastle of an American vessel is soil of the United States. It is said that the thought is a legal fiction. So it is; but

the fictions of the law are the most stable and substantial facts known to it. To simplify the question, take the case of an alien sailor, who as a British subject sails from Liverpool to a port in this country. He is admitted as a sailor temporarily with a 60-day limit of stay. Within that time he ships on an American vessel, which touches at Japanese, Chinese, and finally a Mexican port; he remaining on board until he again lands at a port in this country. The concept that he has not been out of the country is clear enough, on the fiction of which we have spoken. If his second voyage is a second entry into this country, from what country does he come; and, if he is to be deported, what is the country 'whence he came'? On the other hand, just as embarrassing questions can be asked from the other side. The sailor spoken of had the right to stay in the country only 60 days. Could he then ship on an American vessel without subjecting himself to the penalty of deportation?

The only escape from many imagined dilemmas is to give, as is often done, a different meaning to the same word under different situations and uses. When speaking of sailors, above referred to, remaining in the United States for more than 60 days, 'in the United States' means remaining within its territorial limits. For many purposes, however, including an interpretation of the immigration law, an American vessel is American soil. When, therefore, one who is in the United States boards an American vessel, and remains on board of her until her return to her home port, he cannot be classified as an alien immigrant 'coming from' any other country, no matter at how many foreign ports the vessel may have touched, for he

has never (for immigration nor for many other purposes) been out of the Unjted States" (29 Fed. 2nd 587-588).

Annexed as an addenda to this brief are copies of four unreported opinions recently rendered by Judge Groner, in the District Court for the Eastern District of Virginia. The cases are *Matter of Puga* v. *Schmucker, Dir. of Immigration* and *Matter of Skoge* v. *Schmucker*, both decided January 7, 1929; *Matter of Jundumen* v. *Schmucker*, decided November 22, 1927; and *Matter of Pereiro* v. *Schmucker*, lecided September 21, 1927. These opinions of Judge Groner, which have only recently come to counsel's attention, strongly support petitioner's contention.

The judgments of the Circuit Court of Appeals and the District Court should be reversed and an order directed to be entered sustaining the writ of habeas corpus and releasing petitioner from custody.

Respectfully submitted,

SILAS B. AXTELL,
Attorney for Petitioner.

CHARLES A. ELLIS,
Of Counsel.

Addenda.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA.

January 7, 1929.

In the Matter

of

FRANCISCO PUGA

v.

EDWIN B. SCHMUCKER, Dist. Director of Immigration, on a Petition for Habeas Corpus.

GROSER, *D. J.*:

This is a petition for a writ of habeas corpus. The undisputed facts are as follows:

Petitioner is a native of Spain, thirty-one years old, and has followed the sea for the last twenty years—came to the United States in May, 1920, as a member of the crew of the S. S. "Morro Castle", from Havana, Cuba—was paid off, discharged, inspected, and admitted by the immigration officials at New York. From that date to the time of his arrest at Newport News October 22, 1928, he has been serving on coastwise vessels of the United States, with the exception of two trips to Central America and return made on American vessels, the last in December, 1927. Petitioner stated on his examination in

court that he had come to the United States to reside, that he left his home in Spain in 1920 with the intention not to return, and that he has since resided at all times in the United States. He is able to read and write English.

The question in the case is whether, under the Act of May 26, 1924, he is subject to deportation. I have heretofore held in several cases that under the Act of February 5, 1917, an alien seaman, who had resided in the United States, with the intention of making the United States his home, for three years or more, if able to read and write, was entitled to remain in the United States notwithstanding the provisions of the Act of 1924, and I see no reason to change the conclusion announced in the cases referred to. I have also held in a number of cases that an alien seaman shipping on an American vessel for a round trip voyage to a foreign port with the intention of returning on the vessel to the United States, and who did in fact return in accordance with his contract of shipment, did not thereby lose his status as a resident of the United States.

My attention has been called to the *Claussen* case (16 F. (2d) 15), and to the *Rios* case (24 F. (2d) 654), both of which were decided by the Circuit Court of Appeals, Second Circuit. On the other hand, the Circuit Court of Appeals in the Ninth Circuit (Weedin, 2 F. (2) 321; Nagle, 17 F. (2) 557), and in the Fifth Circuit (Nicolich, 25 F. (2) 245; Persson, 25 F. (2) 247) have taken the opposite view. I have followed the latter in the cases referred to above, and with great deference to the opinions in the Second Circuit, I am disposed to adhere to the conclusion previously reached.

Under these circumstances, the writ will be granted and the petitioner discharged.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA.

January 7, 1929.

In the Matter

of

SAMSON SKOGE

v.

EDWIN B. SCHMUCKER, Dist. Director of Immigration, on a Petition for Habeas Corpus.

GRONER, *D. J.*:

This is a petition for habeas corpus, and the undisputed facts are as follows:

Petitioner, a Norwegian, came to the United States in the fall of 1915 with the intention of making the United States his home, and has resided here ever since. He is a seaman and came in as a member of the crew of a foreign vessel, and has continued to reside in the United States ever since while ashore, working as a sailor or fireman on American vessels, both coastwise and foreign bound. In the latter case, his contract called in each instance for return voyages, and in no case did he ship with the intention of residing in any other country than the United States, or with any other intention than of returning with the ship to an American

port. In 1919 he made his declaration of intention to become an American citizen, but at the time his petition would have been heard, he was at sea, and did not respond to his notice, and his petition was dismissed for failure to prosecute the same. He joined the American Seamen's Union also in 1919, and for six or eight months was employed by the Government on a Government dredge in Philadelphia harbor, and at other times on tugboats in New York Harbor. He last shipped foreign on the American S. S. "Cubore" at Baltimore for a round-trip voyage to Chile, returning to Baltimore with the vessel, where thereafter for two or three months he was confined in the Marine Hospital. The order of deportation regard this last voyage as his entry into the United States.

For reasons which I have heretofore stated in the *Pereiro* and other cases decided September 21, 1927, and which I have briefly referred to in the *Puga* case decided today, I find myself in disagreement with the immigration officials in this respect. I do not think that an alien seaman, legally in the United States, loses his status as such by shipping on an American vessel on a round-trip voyage where his intention is and his contract provides for a return to the United States with the vessel.

The petition will be granted and petitioner discharged.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA.

November 22, 1927.

In the Matter

of

THOMAS JUNDUMEN

v.

EDWIN B. SCHMUCKER, Dist. Director of Immigration, on a Petition for Habeas Corpus.

GRONER, *D. J.*:

The evidence shows that petitioner first came to the United States in 1920 on the Nova Scotia schooner "Cambria", and was paid off at Mobile, Alabama, April 23, 1920, whence he went to the west coast of the United States and worked with an American corporation in Alaska from 1920 until September, 1924, and thereafter worked on coastwise vessels on the Pacific Coast until April, 1925. In April, 1925, he signed on the American S. S. "Atlanta City" at San Francisco for a trip to Europe and back to the United States and was paid off and discharged at Philadelphia July 2, 1925, on the return of the ship and has resided in the United States ever since.

I originally had to pass upon a somewhat similar

case as this (*In the Matter of Jose Perciro*), and I shall consider the memorandum filed by me in that case, so far as applicable, as though it were filed in this case, and in the event of an appeal, it may be used by either side as expressing my views.

I think this man's case is controlled by Section 34 of the Immigration Act of 1917; that is to say, after a period of three years from his original entry, he is not the subject of deportation. He came as a seaman and his entry was lawful though his remaining after the reshipping period was not. Nevertheless after three years his status became fixed and he was entitled to remain and his round-trip voyage on an American ship did not affect this status. In the view I take of the matter, he has never been out of the United States since 1920 in the sense in which departure from the United States was intended by the immigration act. He has been in the jail at Newport News for more than two months awaiting deportation.

An order granting the petitioner's discharge will be entered on presentation.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF VIRGINIA.

September 21, 1927.

In the Matter

of

JOSE PEREIRO

v.

EDWIN B. SCHMUCKER, Dist. Director of Immigration.

GRONER, *D. J.*:

This is a petition for a writ of habeas corpus directed to the District Director of Immigration and others, the purpose of which is to have the petitioner discharged from custody. The District Director of Immigration has filed an answer and the matter has been heard upon the record as made up at the hearing had by the local immigration officials on a warrant of arrest issued against the petitioner and served upon him August 20th last. The record before the local inspector having been forwarded to the Department, a warrant of deportation was issued by the Secretary on the ground that petitioner, not having been admitted under the quota provisions of the law and not having shipped foreign within the allowed time, is now unlawfully in the United

States. At the hearing the petitioner was examined on his own behalf. He testified that he was 39 years old and was born in Spain—that he left Spain September 28, 1906, and came to the United States via Liverpool, arriving in New York in October, 1906, on an English ship as a second class passenger—that he was taken to Ellis Island, examined and then brought over to the Battery on a ferry boat and discharged—that he has lived in the United States ever since—that his occupation is that of marine fireman—that he duly registered for military service during the War—that he paid income taxes for four or five years and during the period of the War he worked on Panama Railroad colliers and an army tugboat, and since the War has worked largely in coastwise shipping. In 1924, he shipped out of Newport News, as fireman on the steamship "Manchurian Prince", on a voyage from the United States to Great Britain and return and on arrival at New York on the return of the vessel, he was paid off and discharged, and furnished with the usual identification card given to alien seamen. It was on the ground that he had left the United States and that his return was a re-entry, i. e., in 1924, that the order of deportation was entered, such re-entry, it is contended, subjecting him to the terms and conditions of the Act of May 26, 1924.

Of course, if petitioner was lawfully admitted to the United States in 1906, the Act of 1924 would not apply, and so the examining officer certified that in his opinion the warrant of arrest should be cancelled and petitioner discharged unless it appeared that his statements as to the time of arrival in the United States and admission here were untrue.

The answer shows that some investigation was made in New York with a view to determining the truth of these statements, and it is either stated in the answer or was stated in open court that an examination of the files of the Bureau in New York did not show petitioner's name as having entered the United States at or about the time mentioned by him. I think it obvious that if the ground of deportation is the untruthfulness of the statements of the petitioner as to the time of his arrival in this country, he should have had an opportunity of examining the record or some proof of their examination by competent authority should have been had at the hearing. I do not know and I cannot assume that the records back a period of 21 years, when the immigration laws were very much less rigidly enforced than at present and very much less drastic in their terms, were necessarily so kept as to exclude a possibility of mistake and without evidence of this kind I think it is equally obvious that petitioner has not had the hearing contemplated by the statute before deportation and there has been no additional or supplemental evidence before me on the subject so that the record as made shows petitioner as having been legally admitted to the United States in 1906. There can be no doubt of the fact that he has resided in the United States since 1907 for the fact is verified by evidence of other witnesses than himself. There is no doubt that he was here long prior to 1917 for in that year he registered for military service. He has not offended any of the laws of the United States and so far as the record shows is a person of good moral character.

It would seem to me under these circumstances that he has met the requirements of proof of legal admission into the United States.

But even if this is not correct, I still think the warrant of deportation unlawful for admittedly he had been in the United States more than five years prior to 1917 and had not during that period been out of the United States and if that is correct—and it is conceded—under the terms of the Act of February 5, 1917, notwithstanding he had not been legally admitted into the United States, he was entitled to remain after having resided here five years or more, or three years or more if able to read and write. It is true this right to remain was subject to his continuing in the United States. If he left the United States for a foreign country, the rights established by his previous residence would be lost and this is what the United States says occurred when he shipped foreign in the "Manchurian Prince". I am constrained to believe this is not the intent or purpose of the statute. He never left the United States with the intention of going into a foreign country. He was a seaman and he shipped on a vessel bound for a foreign port but under a contract to return with the vessel to the United States. He had no intention of leaving the United States. He had no intention of going into a foreign state. His status would have been just as much changed if he had shipped on a coastwise vessel which in the course of her voyage went outside the territorial waters of the United States. These questions have been considered by the courts in a number of instances. See on this subject: *Weedin* v. *Okada*, 2 Fed. (2nd) 178; *U. S.* v. *Claussen*, 16 Fed. (2nd) 15. (In the last named case see the dissenting opinion of Judge Hand.)

The writ will be awarded and the petitioner discharged from custody.